AND
BRIEFS

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No. 16-1161

In the Supreme Court of the United States

BEVERLY R. GILL, ET AL., APPELLANTS
v.
WILLIAM WHITFORD, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF APPELLEES

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is a voter who has no desire to be gerrymandered into oblivion. Especially since he will soon be writing the Court about other "equal protection" issues, e.g., in *Trump v. IRAP*,[2] he writes here to recommend the justiciability of partisan-gerrymandering claims, and to recommend the Court approving of the "efficiency gap" method or other useful instruments to prevent unfair partisan gerrymandering.

The present time is one during which the whole Enlightenment project is in some danger. Francis Fukuyama's legendary "end of history" has not happened, following the end of the Cold War in its Eastern European theater; rather, all kinds of bigotries are on the rise, as opposed to real freedom and democracy and individual worth and rights. Ethno-nationalism—including white nationalism—, religious or pseudo-religious terrorism, kleptocracy, authoritarian government, unreasoning hatred of immigrants and refugees: these all seem to be on the upswing, worldwide.

That being so, it is especially important that the United States, as a longtime beacon, a worldwide symbol, of fairness and rule by the People, have elections where the People's vote actually means something, rather than being "cracked", "stacked",

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[1] No party or its counsel wrote or helped write this brief, or gave money meant to fund its writing or submission, *see* S. Ct. R. 37. Blanket permission to write briefs is filed with the Court.
[2] 16-1436, 857 F.3d 554 (4th Cir. 2017), *cert. granted* (U.S. June 26, 2017).

"packed", or "hacked" into a mere parody of what it should be. People, including Americans, should be equal, autonomous, and free, instead of being unequal, manipulated, or enslaved.

So Amicus writes here, "casting his vote" for a fair electoral system with as little partisan, or other invidious, gerrymandering as reasonably possible—if the Court wills it. And the various amendments to our national Constitution show that history is moving in the direction of more fairness, so the Court may wish to move similarly.

SUMMARY OF ARGUMENT

One source of legitimacy for the Court to find partisan gerrymandering justiciable and reform-worthy, is the U.S. constitutional amendments dealing with elections and the role of Congress.

On the one hand, there are admittedly a number of constitutional amendments, or elements of the Constitution, which may not seem greatly to support the justiciability or reform of partisan gerrymandering.

But on the other hand, there is an even larger number of constitutional amendments which do seem to support the justiciability or reform of partisan gerrymandering, because those amendments support voting rights in general, or support limiting the role of Congress or state legislatures in our elections.

Republicans may cavil at the end of excessive partisan gerrymandering; but it may be their own

skins that get saved by the contemplated reforms, since changing demographics and other phenomena may eventually favor Democrats, who might gerrymander Republicans into impotence unless reforms prevent that from happening.

Human dignity itself weighs in favor of restricting partisan gerrymandering. Why should governments be allowed to make your vote be inferior to somebody else's, without a very serious non-partisan reason?

It is difficult for America to be great if its legislatures act like enemies towards their own employers, the People, and the People's right to have their votes count equally. Keeping America great may mean, then, keeping districting as nonpartisan as reasonably possible—and with the judiciary's help, as needed.

Finally, just as the Court itself gives each Member an equal vote, the Court should ensure American citizens get an equal vote too, instead of an unfairly gerrymandered one.

ARGUMENT

I. THE U.S. CONSTITUTIONAL AMENDMENTS ON ELECTIONS OFFER THE COURT MORE POWER TO FIND PARTISAN GERRYMANDERING JUSTICIABLE AND REFORMABLE

Skeptics, or the thoughtless, may wonder why the Court or other judiciary elements should interfere with another branch of government, the legislature, regarding election districting issues. Can't the

legislatures police themselves? the argument might go. Is the sacred "separation of powers" being violated if partisan gerrymandering is found justiciable? The Court could use some extra justification, then, if it wants to regulate how legislatures draw voting districts, and seem to have legitimacy in doing so.

Fortunately, one such source of power comes from the highest source of written law in America. The implications, sometimes poetically known as "emanations" or "penumbras", of Constitutional provisions, including amendments, have historically allowed the Court to make decisions based on privacy or other issues. As we shall see, of the twenty-seven amendments to the Constitution, a great number are helpful to the cause of finding partisan gerrymandering justiciable.

II. ON THE ONE HAND: SOME CONSTITUTIONAL AMENDMENTS MAY SEEM TO FAVOR ALLOWING LEGISLATURES WIDE CONTROL OVER ELECTION DISTRICTING, EVEN GERRYMANDERING

Of the seventeen constitutional amendments following the first ten that are in the Bill of Rights (of which the First, Fifth, Ninth, and Tenth Amendments all arguably support individual voters' rights), an astounding eleven are about electoral issues in some way, including issues related to the status of Presidents and Vice Presidents. (If you remove from the number of amendments the two about Prohibition, the Eighteenth (1920) and Twenty-First (1933), that "cancel each other out", then 11 out of 15 post-Bill-of-Rights amendments are

about elections—almost three-quarters.) So the body of amendments has much to say about elections in this country.

However, speaking as a "devil's advocate", Amicus notes that not all of those amendments support privileging individual voters over legislatures. For example, the Twelfth Amendment (1804), *see id.*, continues the anti-democratic institution of the Electoral College. (It is fascinating that no American voters outside of Congress may have ever directly voted for President or Vice-President, under the Constitution; all they ever voted for is how their particular State would vote on that issue in the Electoral College. So much for democracy.)

Too, the Twelfth Amendment shrinks the value of the popular vote even further, by making Congress' vote among the top three electoral-vote getters, assign only one vote to each State. *Id.* § 3 cl. 2. Wyoming and California would each have one vote, despite their huge disparity in population. This bizarre, quasi-feudal arrangement does not seem to support the rights or value of the individual voter very much.

Then again, that was in 1804, over two centuries ago. Various other amendments, or parts of them, are more of a "wash", in that they may not go very much towards one pole or the other; or if they go towards the pole of privileging legislatures, they may not go too far.

For one, the Fourteenth Amendment (1868) addresses voter (dis)enfranchisement, but largely in

its language about former Confederates' right to vote, not a very relevant situation today. *Id.* §§ 2, 3. And "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article", arguably puts the Amendment's various issues more under the control of Congress rather than the judiciary.

The Twentieth Amendment (1933) gives Congress much say about events such as the death of a person chosen for President or Vice President, and who would replace that person. *Id.* § 3 cl. 2, § 4. And the Twenty-Second Amendment (1951) limits the rights of voters, by forbidding them from voting for a President's having more than two terms. *Id.* § 1 cl. 1.

Finally, the Twenty-Third (1961) and Twenty-Fifth (1967) Amendments allow, respectively: Congress having authority over elections in the District of Columbia (§ 1 cl.1, § 2); and Congress being allowed to approve a replacement for an absent Vice President, and also to partially determine the ways some high officers may have authority to remove the President, if he or she seems unable to function (§§ 2, 4). Again, there may seemingly be little here that diminishes the role of Congress, or supports judicial review of partisan gerrymandering.

III. HOWEVER, A GREATER NUMBER OF CONSTITUTIONAL AMENDMENTS MAY FAVOR ALLOWING INDIVIDUAL VOTERS DIGNITY, AND IMMUNITY FROM GERRYMANDERING

But when we look at other amendments besides the ones mentioned—or different portions of amendments already mentioned—, an alternative picture swims into order. Section 1, Clause 2 of the Fourteenth Amendment, notably, protects people's due-process and equal-protection rights, and their privileges and immunities, not to mention "liberty", *id.*, presumably including the right to vote and have one's vote count seriously.

And the show really starts, so to speak, with the Fifteenth Amendment (1870), defending rights to vote regardless of race, color, or slave status, *id.* This prevents "gerrymandering" minorities out of their voting rights.

The Seventeenth Amendment (1913) takes away power from state legislatures to elect Senators, and gives it to the People, *see id.* § 1 cl. 1. Here is a clear rebuff to the idea that legislatures should be omnipotent *vis-à-vis* election issues.

The Nineteenth Amendment (1920), *see id.*, nobly echoing the Fifteenth, disabled sex as a restraint on Americans voting.

The Twenty-Third Amendment not only speaks about Congress' control; rather it is also a broadening of the franchise, to people in the District of Columbia, *id.* § 1 cl. 2. So the Amendment follows, to that extent, in the great forward line of the Fifteenth and Nineteenth Amendments, giving more Americans the dignity of a vote.

The Twenty-Fourth Amendment (1964), around the time of the Civil Rights Movement, prevented

poll taxes, with their race- and class-discriminatory ugliness, from restricting the franchise, *see id.* Thus, legislatures which contrived poll taxes to strip individual voting rights, were rightfully gelded by the Amendment.

The Twenty-Sixth Amendment (1971) allowed adults, people of 18 or older who could be drafted to go die for their country, to be enfranchised to vote, *id.*, echoing the great pro-democratizing story of the Fifteenth, Nineteenth, Twenty-Fourth, and other Amendments.

Finally, there is the Twenty-Seventh Amendment (1992). While that amendment is not about "election law" *per se*, it does mention elections, in the context of pay for Congress. And since we can safely assume that Congress is probably not going to *lower* its own pay, what the Amendment effectively means is that Congress must wait a term before receiving a raise that it gives itself, *see id.*

This reminds us that *Congress is meant not to serve itself, but to serve others, the People.* Selfishness is constrained, at least in part. And this parting lesson from the Amendments chimes nicely with the idea that Congress must be policed and constrained, even if it doesn't like it, to humbly serve the People, instead of, say, brutally gerrymandering them to serve Congresspersons' selfish interests rather than the interests and dignities of the People.

The post-Bill-of-Rights amendments, or sections of amendments favoring enfranchisement of the People not only outnumber those that somewhat disfavor enfranchisement, or are relatively neutral

on the topic (by 8 to 6, from counting the amendments mentioned *supra*), but are also somewhat more weighted towards the more recent years of the Constitution, whereas those which are neutral, or favor the power of Congress more, are somewhat more weighted towards the past, even the far past (e.g., 1804). Thus, the movement of our supreme law and American history is strongly in favor of valuing the individual voter's dignity: this should empower and encourage the Court to find partisan gerrymandering justiciable and reformable. Anyone who argues otherwise may be flying in the face of what our progressing Constitution implies.

IV. REPUBLICANS, OR OTHER POTENTIAL ELECTORAL MINORITIES, MAY BE "COOKING THEIR OWN GOOSE" DOWN THE LINE, BY OPPOSING JUSTICIABILITY OR REFORMS FOR PARTISAN GERRYMANDERING

Given the trend for growing power and political influence of women, minorities, sexual minorities, and other traditionally underrepresented groups, the long-term outlook for the Republican Party, at least as we know it, may not be very bright. If not for the Electoral College, in fact, Al Gore and Hillary Clinton would have been elected President, not George W. Bush and Donald Trump.

Thus, since Democrats are not necessarily more virtuous than Republicans (and the other way around), the near future could involve merciless partisan gerrymandering against Republicans. This would be unfair. So, ironically, Republicans might want to support justiciability of partisan-

gerrymandering claims, since "the life they save may be their own", at some point.

The Court would well serve all Americans, regardless of political party, by offering a cure, if an imperfect one, to the disease of partisan gerrymandering.

V. "MAKE AMERICA NONPARTISAN AGAIN"; OR, GERRYMANDERING IS UNETHICAL BULLYING AND DESERVES CURTAILMENT

George Washington, in his 1796 farewell address, offered a parting warning against political parties and factionalism, cautioning that

> [t[he alternate domination of one faction over another, sharpened by the spirit of revenge . . . . which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism. . . . the common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it.

Id. Quite so. And one of the worst manifestations of party spirit is bullying of another party, including the form of bullying called gerrymandering.

The "Game of Votes" can often be vigorous, but that does not mean it should be brutal or unfair. To analogize it to a contest of height and physical might: what if there were a huge warrior, call him the Mountainous Man, or the Gross Giant; and also another person, a very little man, call him "Tiny

Lancaster", Would it be fair to give Lancaster less of a vote in the land's elections, due to his small size and its tendency to make him weaker than the giant?

Similarly, when a party gerrymanders—or at least when it does so without relying on some possibly-legitimate non-partisan reason such as natural geographical features, etc.—, it does not use right but the temporary might it has by means of being in the majority. The Court should help slay the dragon of gerrymandering, lest might conquer right. (True, party affiliation may not be as immutable a characteristic as height. Still, to be discriminated against by the State, on the basis of party, is still a foul thing.)

And it is not only the secular Enlightenment, mentioned *supra* at 1, which is at issue here. What we may call the "Abrahamic Enlightenment" also resounds, e.g., "Then God said, 'Let us make man in our image, after our likeness'", *Genesis* 1:26 (English Standard Version). If humans have divinely-granted dignity, needlessly gerrymandering them into less dignity is abominable.

And while the "efficiency gap" or other methods may not be perfect: even if they need some tweaking by the Court, they may well be worth trying. Gerrymandering has gone on too much for too long. As Franklin D. Roosevelt said, "[T]he country demands bold, persistent experimentation. It is common sense to take a method and try it: If it fails, admit it frankly and try another. But above all, try something." Oglethorpe U. Commencement Address (May 22, 1932).

* * *

"Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (Scalia, J.). With due respect, the late and frequently great Justice Antonin Scalia may have been wrong in part. The Legislature is supposed to provide fair and rational laws which serve the People, who pay the salaries of the various National or State Legislatures, *cf.* U.S. Const. amend. XXVII (restricting pay of Congress). If the Legislature fails to do so, the Judiciary may have to step in—as in ending partisan gerrymandering, to the extent reasonably possible.

After all, "[I]t is not clear that political gerrymandering is a self-limiting enterprise", *Davis v. Bandemer*, 478 U.S. 109, 126 (1986) (White. J.). Somewhat as with antitrust, where someone must police corporations if they do not police themselves, someone must police legislatures if they do not show restraint.

Imagine, as a last thought experiment, the Court itself being gerrymandered. What if, as a *reductio ad absurdum*, the female Members of the Court were so "districted" so that they could have a maximum of two votes, not three? Or how about districting by State of origin? so that born New Yorkers could have a maximum of two votes on the Court. Would the Court's Members enjoy that?

One suspects not. Then, as Jack Burden said as the very last words of Robert Penn Warren's political-corruption epic *All the King's Men* (1946),

one must "go into the convulsion of the world, out of history into history and the awful responsibility of Time."[3] It seems like time for the Court responsibly to take advantage of the modern statistical methods and election research that Appellees have convincingly put forward, and go help the rest of the Nation have a voting regime at least as fair as that the Court has for itself.

CONCLUSION

The Court should find partisan gerrymandering justiciable, and also uphold the court below, insofar as reasonably possible, and with any needed improvements; and Amicus humbly thanks the Court for its time and consideration.

September 5, 2017 Respectfully submitted,

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[3] *Id.*, ch. 10, *available at* Wikiquote, *All the King's Men*, https://en.wikiquote.org/wiki/All_the_King%27s_Men (as of 13:56 GMT, Feb. 13, 2017).